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MEMORANDUM

February 21, 2011

FROM: Howard E. Manning, Jr. 

TO: The Honorable Philip E. Berger, President Pro Tem of the Senate
The Honorable Thom Tillis, Speaker of the House of Representatives

Subject: EOC testing in U.S. History, Civics and Economics and Physical Science and the constitutional rights of children to obtain a sound basic education under the **Leandro** decisions. EOC testing in those and other core Leandro subjects is constitutionally mandated as part of the accountability part of the process and therefore, not subject to elimination by House Bill 48 or other legislative action.

Gentlemen:

This memorandum pertains to House Bill 48 which materially alters G.S. 115C-174.11 and specifically eliminates End of Course tests in the following subjects: U.S. History, Civics and Economics, Algebra II and Physical Science. History, Civics and Economics (formerly- economic and political systems) and Physical Science are specific core subjects set out in the **Leandro I** decision by the North Carolina Supreme Court.

Algebra II is a mathematics course that a student must master in order to "enable a student to compete on an equal basis with others in further formal education" – It is a gateway course for college prep - or gainful employment in contemporary society.

End of Course tests (EOC) are used to assess high school level courses.
End of Grade tests (EOG) are used to assess reading and math in grades 3-8.

There was similar legislation passed in the House last session as an amendment to Senate Bill 897 which purported to eliminate the EOC tests in U.S. History, Civics and Economics and Physical Science. However, once the leadership of the General Assembly was advised that the EOC tests in those **Leandro** core subject areas were essential measurements of how each child has performed in

these subjects in order for the State of North Carolina to fulfill its constitutional obligation to monitor whether or not the child has obtained a sound basic education as prescribed by the **Leandro** decisions the amendment **was not enacted into law**.

Quite frankly, I believed that the issue of elimination of those EOC tests had been resolved, once and for all, and thus, a constitutional confrontation had been avoided.

Unfortunately, the House has rushed through House Bill 48 which eliminates the core **Leandro** EOC tests once again and if the bill gets passed in the Senate and enacted into law, we run the risk of a constitutional confrontation on this subject because of the Supreme Court's decisions in the **Leandro** case in which I am the presiding judge.

Former Chief Justice Burley Mitchell (Leandro I) and former Justice Bob Orr (Leandro II) have reviewed this memorandum and concur with its conclusions.

This memorandum contains Four Parts:

First, it will set out and discuss relevant portions from both of the Supreme Court's **Leandro** decisions relating to a child's right to have an equal opportunity to obtain a sound basic education under the North Carolina Constitution and the importance of EOG and EOC testing and accountability in determining that a child is obtaining a sound basic education at that point in their educational path.

Second, it will clearly show based on the Supreme Court decisions that the constitutional right to the equal opportunity to obtain a sound basic education **is vested in, and belongs to each child, not to the adults** and the importance of the EOG and EOC testing of each child to objectively monitor whether or not they have mastered the subject matter at Level III (grade level) as shown by the EOG and EOC test results. The second part will also discuss high school courses now tested by EOC and how the results are reported to determine the performance composite for each high school in North Carolina and North Carolina's statutory programs for accountability and testing.

Third, it will set out and discuss how the curriculum or Standard Course of Study ("SCOS") should be taught in our public schools using pacing guides and appropriate assessments and in doing so, will refute the commonly used phrase **"teaching to the test" which is used by those adults who do not want to be subject to public accountability when their teaching efforts produce student performance which is below Level III on the EOG or EOC tests.**

Fourth, it will set out and discuss the overlooked aspect of fiscal accountability to the taxpayers of North Carolina who are investing billions of tax dollars in K-12

education expecting students to be taught by competent, certified, **Leandro** compliant educators so that students may obtain a sound basic education in the process. The EOC and EOG test results provide the data for the LEAs, Superintendents, Principals, the State Board of Education, DPI, the General Assembly, the Court and the public to determine whether or not their tax dollars invested in every public school in the state are being used to educate children so as to ensure that all children have an equal opportunity to obtain a sound basic education which is **their constitutional right**.

Part One:

The North Carolina Supreme Court's decisions in **Leandro I** (346 N.C. 336) on July 24, 1997 and **Leandro II** (358 N.C. 605) on July 30, 2004, set in stone, once and for all, the following tenets relating to the Constitutional guarantee to each child of the right to an opportunity to obtain a sound basic education:

FIRST: We conclude that Article I, Section 16 and Article IX, Section 2 of the North Carolina Constitution combine to **guarantee every child** of this state an opportunity to receive a sound basic education in our public schools. For purposes of our Constitution, a 'sound basic education' is one that will provide the student with at least:

1. sufficient ability to read, write and speak the English language and a **sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society;**
2. **sufficient fundamental knowledge of geography, history and basic economic and political systems to enable the student to make informed choices** with regard to issues that affect the student personally or affect the student's community, state and nation;
3. **sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education and training; and**
4. **sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment** in contemporary society.." emphasis added; (*Leandro I* p. 347).....

SECOND: Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution, as interpreted by *Leandro*, **guarantee to each and every child the right to an equal opportunity to obtain a sound basic education requires that each child be afforded the opportunity to attend a public school which has the following educational resources, at a minimum:** LEANDRO COMPLIANT PREREQUISITES

First, that every classroom be staffed with a competent, certified, well-trained teacher who is teaching the standard course of study by

implementing effective educational methods that provide differentiated, individualized instruction, assessment and remediation to the students in that classroom.

Second, that every school be led by a well-trained competent Principal with the leadership skills and the ability to hire and retain competent, certified and well-trained teachers who can implement an effective and cost-effective instructional program that meets -the needs of at-risk children so that they can have the equal opportunity to obtain a sound basic education by achieving grade level or above academic performance.

Third, that every school be provided, in the most cost effective manner, the resources necessary to support the effective instructional program within that school so that the educational needs of all children, including at-risk children, to have the equal opportunity to obtain a sound basic education, can be met. 358 NC 636, *supra*.

The constitutional right to have an equal opportunity to obtain a sound basic education is a right vested in each and every child in North Carolina regardless of their respective age or educational needs.

The children of North Carolina are our state's most valuable renewable resource. 358 NC 616. Each and every child in North Carolina is vested with the constitutional right to have an equal opportunity to obtain a sound basic education.

"In *Leandro*, this Court held that the state's Constitution 'guarantees every child of this state an opportunity to receive a sound basic education in our public schools.'" 346 NC 347, 358 NC 619

We read *Leandro* and our state Constitution, as argued by plaintiffs, as according the right at issue (an opportunity to receive a sound basic education) to all children of North Carolina, regardless of their respective ages or needs. Whether it be the infant Zoe, the toddler Riley, the preschooler Nathaniel, the "at-risk" middle-schooler Jerome, or the not "at-risk" seventh-grader Louise, the constitutional right articulated in *Leandro* is vested in them all. *Leandro II*, 358 NC 620.

In *Leandro*, this Court decreed that the children of the state enjoy the right to avail themselves of the opportunity for a sound basic education. 346 NC 347 The Court then proceeded to declare that "an education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate." *Leandro I*, 346 NC 345.

Leandro II affirmed the trial court's determination that a child who is showing Level III (grade level) or above proficiency on the State's ABC tests, End of Grade (EOG) or End of Course (EOC), is obtaining a sound basic education in that subject matter AND that a child who is not showing Level III proficiency (performing below grade level) on the ABC tests is not obtaining a sound basic education in that subject matter and established Level III proficiency as the standard bearer for test score evidence. 358 NC 624,625, *supra*.

"After considering the evidence and arguments from both sides, the trial court ruled that Level III proficiency (**EOG and EOC test scores**) was the required standard. The trial court rejected the State's argument that Level II proficiency more closely describes the 'minimal level of performance which is indicative of a student being on track to acquire' a **Leandro-comporting education and concluded that: (1)'a student who is performing below grade level (as defined by Level I or Level II) is not obtaining a sound basic education under the Leandro standard'; and (2)'a student who is performing at grade level or above (as defined by Level III or Level IV) is obtaining a sound basic education under the Leandro standard.'**

On appeal, although the State assigned error to the trial court's conclusion concerning the Level III standard, it made no argument to that effect in its brief. As a consequence, the issue is considered abandoned under the appellate rules, N.C. R. App. P. 28(b)(6). In addition, **our own examination of the issue reveals no grounds to disturb the trial court's findings and preliminary conclusions pertaining to the question of which test score standard should be used. As a consequence, we find no error in the trial court's ruling that a showing of Level III proficiency is the proper standard for demonstrating compliance with the Leandro decision.**

"With Level III proficiency established as the standard-bearer for test-score evidence, we turn our attention to whether the number of Hoke County students failing to achieve Level III proficiency is inordinate enough to be considered an appropriate factor in the trial court's determination that a large number of Hoke County students had been improperly denied their opportunity to obtain a sound basic education.

At trial, EOG and EOC test scores from across the state and from Hoke County were submitted into evidence. In addition, education and testing experts were called to testify about what the scores mean, how statewide scores compare to those of Hoke County, and what such comparisons might indicate. In its third memorandum of decision, the trial court initially assessed the quantitative elements of the test score evidence and concluded that it clearly shows that Hoke County students are failing to achieve Level III proficiency in numbers far beyond the state average. In turn, the trial court then proceeded to conclude that

the failure of such a large contingent of Hoke County students to achieve Level III proficiency **is indicative that they are not obtaining a sound basic education in the subjects tested.** In other words, **evidence tending to show Hoke County students were faring poorly in such standardized test subject areas as mathematics, English and history was relevant to the primary inquiry:**

Were Hoke County students being denied the opportunity to obtain an education that **comports with the *Leandro* mandate --- one in which students gain sufficient knowledge of fundamental math, science, English and history in order to function in society and/or engage in post-secondary education or vocational training.** 346 N.C. 347, *supra.*” We agree with the trial court’s assessment that test score evidence indicating Hoke County student performance in **subject areas that correspond to the very core of this Court’s definition of a sound basic education is relevant to the inquiry at issue.**” *Leandro II*, 358 N.C. 624,625

“Footnote: 11. We note that the test score evidence, in and of itself, addresses the **question of whether students are obtaining a sound basic education** rather than the question of whether they were afforded their opportunity to obtain one. This distinction is important. **While a clear showing of a failure to obtain a sound basic education is a prerequisite for demonstrating a legal basis for the designated plaintiff school children’s case, the failure to obtain such an education is not the ultimate issue in dispute.**” 358 NC 625,626

In *Leandro II*, the Supreme Court also affirmed the trial court’s determination that the **State of North Carolina was ultimately responsible for providing the children with the equal opportunity to obtain a sound basic education and when that right was not be properly provided, the State must assume responsibility for, and correct, those educational methods and practices that contribute to the failure to provide children with a constitutionally – conforming education.**

Additionally, when the State assesses and implements plans to correct educational obligations in the face of a constitutional deficiency in an LEA, or particular school, **the solution proposed must ensure competent teachers in classrooms, competent principals in schools and adequate resources to support the instructional and support programs in that school so as to be *Leandro* compliant.** *Leandro II*, 358NC 635,636.

The Supreme Court ended its decision in *Leandro II* with the following:

This Court now remands to the lower court and ultimately into the hands of the legislature and executive branches, one more installment in the 200-plus year effort to provide an education to the children of North Carolina. Today’s challenges are perhaps more difficult in many ways than when Adams articulated his vision for what was then a fledgling agrarian

nation. The world economy and technological advances of the twenty-first century mandate the necessity that the State step forward, boldly and decisively, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in Leandro, but fulfill the dreams and aspirations of the founders of our state and nation. Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. Whether the State meets this challenge remains to be determined. (358 N.C. 605,649)

Part Two:

Based on the foregoing discussion of the **Leandro** decisions and their tenets, there is absolutely no question that the constitutional right to have the opportunity to obtain a sound basic education **is vested in and belongs to each and every child** in North Carolina, rich or poor, at-risk, or not at-risk, regardless of age and need.

What is the primary objective measurement to determine whether or not the child's right to have the opportunity to obtain sound basic education is being met in the first instance? **The primary objective measurement is how the child is performing on the summative End of Grade (EOG) or End of Course Tests (EOC) given statewide each year so that all children are tested on the same subject matter for each subject and course regardless of where they live.**

The North Carolina Supreme Court has declared that a child who is performing at Level III (grade level) proficiency on the standardized End of Grade and End of Course tests given statewide each year **is obtaining a sound basic education in that particular subject area or high school course and the reverse is also the case – when a child is performing at Level I, or Level II, below grade level on the End of Grade and End of Course tests, that the child is not obtaining a sound basic education.**

The Supreme Court has also declared that evidence tending to show large numbers of students failing to achieve Level III proficiency on the EOG and EOC tests **is relevant to the primary inquiry as to whether or not those students are obtaining a sound basic education.** “We note that the test score evidence, in and of itself, addresses the question of whether students are obtaining a sound basic education....” **Leandro II, 358 NC 626.**

It is **the child's constitutional right** to be provided with the equal opportunity to obtain a sound basic education in the core subjects in grades K-12 so they can graduate from high school with sufficient academic and vocational skills to enable the child to compete with others in further formal education or gainful employment in contemporary society. **246 NC 347.** In order to determine if the

child is obtaining those skills, the child's progress is measured by the EOG and EOC tests in the required subjects.

Specifically identified core subjects required by the constitution under Leandro are: fundamental **mathematics** and **physical science** to **enable the student to function in a complex** and rapidly changing society; fundamental **knowledge of geography, history and basic economic and political systems**; and sufficient **academic and vocational skills to enable the student to successfully engage in post-secondary education** and training. **246 NC 347.**

Accordingly, the EOC standardized tests given to high school students are required objective measurements to determine whether or not the student is obtaining a sound basic education in core subject areas in high school which core subject areas include history, economic and political systems (now civics and economics) physical science and mathematics sufficient to enable each child to successfully engage in post-secondary education and training.

The flip side is obvious. If the student **is not tested in a subject** with the statewide, standardized EOC tests given to all students, **there is no objective measurement of that student's performance to determine if he or she is performing at Level III or above, or Level I or II (below grade level and not obtaining a sound basic education in that subject).**

Not only is the child entitled to be objectively measured to determine whether he or she is obtaining a sound basic education, it is of utmost importance to have the statewide test scores available to ensure that LEAs, superintendents, principals and teachers in all schools, including high schools, **are held accountable for the lack of academic progress and growth of the children they are being paid to educate.**

The following highlights the importance of measuring academic performance by standardized tests in high schools. Each year high school students in North Carolina are tested in the following subjects depending on their grade in high school and course selection. Most students take English I and Algebra I in the ninth grade in high school.

For 2009-2010 the individual High School Performance Composite was based on students' performance in the following nine (9) subject areas:

- Algebra 1
- Algebra 2
- Geometry
- Civics-Econ
- Biology
- English 1
- Physical Science

Performance Composite

The high school performance composite is based on the number of EOC tests taken by students who performed at Level III (grade level) and above Level IV divided by the number of tests taken (proficiency denominator).

A high school whose performance composite is 80% or above and has achieved high growth is a high school that the public and parents can certainly have confidence in if their child attends that school because 8 out of 10 of the EOC tests taken by children in that school showed that the child taking the test was performing at or above grade level, Level III and thus, obtaining a sound basic education in that high school course.

A high school whose performance composite is below 50% and has not met growth standards is a high school that the public and parents can certainly have no confidence in and the performance composite tells the public and the parents that the children in that school are not obtaining a sound basic education as less than 50% of the tests taken are scored below grade level, ie. Level I or Level II.

The EOC tests provide the data on academic performance and are given statewide so all high schools are measured against themselves and others in the state. The EOC tests also form the basis for measuring academic growth for each child and for the entire school. What is growth?

Growth measures a child's expected academic progress in a subject.

A child's expected academic progress for each is measured using a growth formula. The growth formula predicts where each child should be academically at the end of the course. Put another way, the growth formula predicts how far the child should grow academically by the end of the particular course.

The growth formula for each child in elementary, middle and high school is used to predict their academic growth for each core subject which is measured by EOC and EOG testing.

The growth formula for each child expects each child to make academic progress each year even if the child is performing at Level 1 or Level 2. The growth for the entire school is reported in the ABCs report. However, the growth measurement is not part of the performance composite which simply reports on the academic success or failure of the students in a school by course or in grades 3-8, by reading and math EOG tests.

The performance composite, coupled with the growth measurement, provides the State Board of Education, DPI, the LEA, Superintendent, Principal, Teachers,

parents, students, this Court and the public at large with objective data indicating how the students in the high school(or any school) are performing academically in the core academic courses. Not all high school courses are tested by EOC tests such as physics, chemistry, and other upper level courses.

Each year, the Court receives into evidence the End of Course Test Results by high school and the status of growth in the high school. Here are two (2) high schools' results on the individual EOC tests and their performance composites for example and comparison. The data contained is essential to determine academic progress or lack of progress in each course and in the entire high school.

Anson High School 2009-2010 EOC test results plus growth.

Algebra 1- % of children at grade level (proficient)	30.9	(69.1% not proficient)
Algebra 2- % of children at grade level (proficient)	60.0	(30.0% not proficient)
Biology -% of children at grade level (proficient)	56.9	(43.1% not proficient)
Civics -% of children at grade level (proficient)	59.0	(40.0% not proficient)
English 1- % of children at grade level (proficient)	54.1	(45.9% not proficient)
Geometry-% of children at grade level (proficient)	60.4	(39.6% not proficient)
Phys. Sci.-% of children at grade level (proficient)	37.2	(62.8% not proficient)
US Hist. - % of children at grade level (proficient)	57.4	(42.6% not proficient)
Writing CI-% of children at grade level (proficieint)	30.6	(69.1% not proficient)

School wide percent proficient 730 - Proficiency denominator 1578 tests taken
730 divided by 1578 = **46.3% performance composite for school**
Growth standards – **did not meet growth** and did not meet high growth.

Footnote: NCDPI reported to the Court that for FY 2010 **Anson High cost the taxpayers of North Carolina \$7,582,465, the majority of the money going to salaries and benefits for teachers and staff. All this money for 46.3% performance and no growth should raise questions about accountability.**

Compare Anson High School to:

Ashe County High School 2009 – 2010 EOC test results plus growth.

Algebra 1- % of children at grade level (proficient)	85.0	(15.0% not proficient)
Algebra 2- % of children at grade level (proficient)	73.4	(26.6% not proficient)
Biology -% of children at grade level (proficient)	90.3	(09.7% not proficient)
Civics -% of children at grade level (proficient)	82.0	(18.0% not proficient)
English 1- % of children at grade level (proficient)	82.9	(17.1% not proficient)
Geometry-% of children at grade level (proficient)	90.9	(09.1% not proficient)
Phys. Sci.-% of children at grade level (proficient)	98.6	(01.4% not proficient)
US Hist. - % of children at grade level (proficient)	87.8	(12.12% not proficient)
Writing CI-% of children at grade level (proficieint)	85.8	(14.2% not proficient)

School wide performance -- 1729 proficient tests - Proficiency denominator
1977 tests taken
1729 divided by 1977 = **87.5% performance composite for school**

Growth standards – **met growth** and did not meet high growth.

The identical data is available for every high school in North Carolina. This data shows whether or not the children attending a particular high school are, as a group, obtaining a sound basic education or whether, as a group, large numbers are not obtaining a sound basic education. **It does not take a rocket scientist to realize why so many educators do not like the EOC high school tests when the test results for their high school show to the public and parents and students that their students are not obtaining a sound basic education in the tested courses.**

For example - when there are 7 out of 10 children taking Algebra 1 in Anson High School that are **below grade level and not obtaining a sound basic education** in that course, the principal and teacher(s) in that subject are accountable.

Having this data available by statewide EOC testing in the core subjects not only tells everyone when the children **are not obtaining a sound basic education in the subject**, which is their constitutional right, but it also tells the public that there is something wrong with the school and its delivery of the course material. That information leads directly to the principal and faculty and to the superintendent's office as well. If the Algebra 1 class were taught by a competent certified teacher as required by **Leandro** it would be highly unlikely that 70% (7 out of 10) of the children in Algebra 1 would be performing below grade level, Level III. However, if the EOC test in Algebra 1 were to be eliminated, this critical information vanishes and the teacher and principal are "off the hook" and have evaded accountability and public scrutiny.

Eliminating 4, or even 1, of the EOC tests for core high school subjects is simply not permitted by the **Leandro** decisions. The bottom line is that if the EOC tests in the core academic subjects are eliminated, the child's constitutional right to be assessed as to the child's academic progress (whether or not the child is obtaining a sound basic education in that subject) has been violated.

The same is true if the State were to eliminate the EOG tests in grades 3-8 and to eliminate the assessments in K-2 which are critical to assessing a small child's academic progress in reading and math skills in the early stages of their educational journey.

The assessment of academic performance by EOC and EOG tests is mandated by **Leandro** for each child as part of their vested constitutional right to have the opportunity to obtain a sound basic education and is an integral part of

measuring and assessing their academic performance to determine if they are functioning at Level III or above – ie – obtaining a sound basic education.

The Legislative Branch has, in the past, recognized the necessity for EOG and EOC statewide testing in order to measure student progress and provide for accountability for academic results.

Article 10A, Part 2. **Statewide Testing Program.**

G.S. 115C-174.10. Purposes of the Statewide Testing Program.

The testing programs in this Article have three purposes: (i) to **assure that all high school graduates possess those minimum skills and that knowledge thought necessary to function as a member of society**; (ii) to **provide a means of identifying strengths and weaknesses in the educational process in order to improve instructional delivery**; and (iii) to **establish additional means for making the education system at the State, local, and school levels accountable to the public for results.**

All three purposes for statewide testing are critical. The tests measure whether the student has made academic progress in the courses taken to be proficient (grade level and level III); to identify strengths and weaknesses so as to improve instruction (be able to indentify schools that are not producing academic achievement at grade level and take steps to correct the academic failures as evidenced by the standardized test results. It is the last purpose that is equally critical – **accountability to the public for results.** The Statewide Testing Program is a means for “**making the education system at the State, local and school levels accountable to the public for results.**”

By utilizing statewide standardized EOC and EOG tests, all public schools and their students are being measured by the same instruments of assessment and the results of those tests provide the public, as well as the individual child, with the level of academic progress, or the lack thereof, within each school and classroom in the State of North Carolina.

To this end -- **accountability in educational instruction** -- the Legislature has created The School-Based Management and Accountability Program which has annual performance goals.

Article 8B. Part 3. **School-Based Accountability.**

G.S. 115C-105.35. Annual performance goals.

- (a) The School-Based Management and Accountability Program shall (i) focus on student performance in the basics of reading, mathematics, and communications skills in elementary and middle schools, (ii) **focus on**

student performance in courses required for graduation and on other measures required by the State Board in the high schools and (iii) hold schools accountable for the educational growth of their students.

To those ends, the State Board shall design and implement an accountability system that sets annual performance standards for each school in the State in order to measure the growth in performance of the students in each individual school. During the 2004-2005 school year and at least every five years thereafter, the State Board shall evaluate the accountability system and, if necessary, modifying the **testing standards to assure the testing standards continue to reasonably reflect the level of performance necessary to be successful at the next grade level or for more advanced study in the content area.....**

For those readers who do not know. The testing standards that “continue to reasonably reflect the level of performance necessary to be successful at the next grade level or for more advanced study in the content area” is the basic definition of achievement Level III, or grade level, which is the **Leandro** standard for determining that the child is obtaining a sound basic education in that subject or content area as determined by EOG and EOC statewide tests.

In short, accountability is achieved by measurement of a child’s academic performance on EOG and EOC tests. The results of the statewide tests not only inform the child, and its parents, of the child’s academic progress towards obtaining a sound basic education, but the results also inform the LEA, the administrators, principals and classroom teachers, of the academic progress or lack thereof, of the children they are charged with educating each year.

The testing accountability system is used to identify low-performing schools where the school fails to meet minimum academic growth standards and a majority of students are performing below Level III. NCGS 115C-105.37.

The identification of low performing schools is accomplished by – you guessed it – an analysis of the standardized EOC and EOG test results – and a low performing school has to notify each parent that the school has “failed to meet the minimum growth standards, as defined by the State Board, and a majority of students in the school are performing below grade level.” 115C-105.37.

In 2007, the Legislature passed 2007-445, s. 1(a)-(c) which required the State Board of Education to designate schools (elementary, middle and high schools) as high-need schools if they met two or more of the following criteria:

- (1) More than forty-five (45%) of students perform at Level 1 or Level 2 on end-of-grade and end-of-course tests.
- (2) Teacher turnover rate

is greater than twenty-five (25%), or (3) More than eighty (80%) of students qualify for free or reduced-price lunches.

In the interest of the shortness of life, the bottom line here is that the Legislature, in addition to the Supreme Court in **Leandro I and II**, has determined that the EOG and EOC statewide testing and accountability systems are essential tools for measuring the academic performance of each student and for holding school systems, schools, principals and teachers accountable for the performance of their students.

The individual student's right to have the equal opportunity to obtain a sound basic education inherently includes the child's right to be properly assessed and have its academic progress measured by EOG or EOC testing to determine if the child is obtaining a sound basic education and for the public to know the truth about the children's academic achievement so as to hold educators accountable for excellent results or poor results.

This individual right applies to all children, including those at-risk of academic failure as evidenced by their below grade level scores on EOC and EOG tests. Just because a course is considered "basic" or "low level" does not justify its removal from the Leandro core course requirements.

The EOG and EOC statewide tests are the linchpins of the State of North Carolina's statutory accountability system and they are required by **Leandro** for assessment of each child's academic progress in obtaining (or not obtaining) a sound basic education and they may not be eliminated using the budget as an excuse. Furthermore, the fact that educators do not like the "tests" because the **test results hold them accountable for the failure of their students to obtain a sound basic education in the subject matter they teach is not a rational or a valid ground upon which to eliminate EOC or EOG standardized testing under North Carolina's accountability and testing system.**

In order to understand this, it is important to continue to keep in mind that the right to the equal opportunity to obtain a sound basic education belongs to, and is vested in, **each child** in North Carolina **NOT the adults** who are charged with the responsibility of educating each child in such a proper manner as to have the child obtain a sound basic education in each subject area required for the child to be successful in today's complex society.

The adults' desire not to be identified and held accountable when their students fail to obtain a sound basic education in the course(s) taught is simply no excuse to eliminate core course testing. To the contrary, the exposure to public accountability for academic results is necessary and legitimate in order to protect the children's right to obtain a sound basic education.

The adult “problem” with statewide standardized EOG and EOC testing boils down to exposure and accountability when children under the adult’s charge in a classroom are not obtaining a sound basic education as evidenced by – the EOC and EOG tests.

Today in North Carolina, test data drives classroom instruction and accountability. The DPI compiles EOC and EOG test results and growth results on every single child in the state and for every school in the state, down to the individual classroom and section of course taught. Upon proper request, the DPI can furnish the data on EOC and EOG tests results, including scale scores, on any educator, by class, by section, in any school in North Carolina. In other words, an educator may no longer be “anonymous” when it comes to the data relating to the academic performance of his or her students on the EOC or EOG tests. This data is available to the principal of the school, the Superintendent of the District and others. The school’s performance results on the tests are available to the general public, on line, on the NC Schools Report Card website.

Today, there is no place for a non Leandro compliant educator to hide from the data revealed by test results. This is a good thing as the child, the parents, and the public should know what is happening at a school academically.

The data informs the public whether a high school is doing very well or whether a high school is doing a dismal job of educating its students. This is accountability to the public as intended by the Legislature when it enacted Statewide Testing and Accountability standards. It is also accountability required by *Leandro*.

As a result of today’s heightened awareness and available data relating to individual school and student academic achievement in each classroom, the natural reaction by the affected adults who are in education, is to seek a way to eliminate the source of the data that holds them accountable. The only way out from under the microscope of accountability is to eliminate the tests themselves and House Bill 48 and its 2010 predecessor, are attempts to do precisely that using the budget as an excuse.

Eliminating the high school EOC tests in the *Leandro* core subjects will impose a significant impairment in the ability to review and analyze any high school’s academic progress and will prevent the parents, child, the Court and the public at large from knowing the academic achievement, or lack thereof, in 4 (44%) out of the 9 EOC tested subjects in high schools.

In short, the high schools and teachers in Algebra 2, US History, Civics and Economics, and Physical Science will be shielded from the public view because there will be no EOC test results for anyone to review to determine if the children in those courses are performing at Level I, II, III or IV. The

teachers of those subjects will be “off the hook” and not be publicly accountable for the educational growth of their students as they are not subject to the EOC statewide tests. This is not permissible.

Helping non Leandro compliant teachers and principals escape from public scrutiny and accountability by eliminating core subject EOC tests in high schools is invalid, simply wrong and in violation of the children’s rights to obtain a sound basic education.

Part Three:

The tired old refrain and criticism from uninformed parents and educators to the effect that EOG and EOC tests are a “distraction and waste of time” because the teachers spend their classroom time “Teaching to the Test” is a Red Herring and not a valid or permissible reason for eliminating any EOG or EOC standardized tests.

To understand why this is so, one must have an basic understanding of how the educational process is designed to work in each classroom and in each subject that will be tested by EOG or EOC tests.

The State of North Carolina’s curriculum for all of the subjects and courses offered to students in pre-K through 12th grade is known as the Standard Course of Study (“SCOS”).

The SCOS prescribes the content of each course or subject. The content area for each course or subject to be taught contains critical standards that all students need to master during the length of the course that is being taught.

The SCOS for each course or subject is designed for the content area to be mastered over a period of 180 days of instruction, or hours if the course is a “block” course in high school. During this period of instruction, the student is expected to master the critical standards that build upon each other as the course goes on during the year.

As critical part of the teaching process of students in any course or subject, the SCOS must be taught at a deliberate but rational pace so that the students can master each critical standard in the course by the end of the year or the block.

In order to effectively accomplish the mastery of the content or subject matter of the course within the time period allotted, the classroom teacher must set the pace of the instruction so as to finish the SCOS critical standards for the course by the end of the school year or allotted hours in a block course.

This necessary function is accomplished by using what is commonly known as a **pacing guide**. **While pacing guides are not provided by DPI, each individual**

LEA and school typically have pacing guides in place for use by each classroom teacher. If pacing guides are not in use, the school principal is not doing his or her job in a *Leandro* compliant manner.

In addition to teaching the SCOS in proper sequence and in a proper time frame, the classroom teacher should also be engaged in frequent assessments of his or her students to determine whether or not they are mastering the critical standards required to obtain a sound basic education in the particular course, to wit: Level III or Level IV (grade level or above).

What are assessments? Partial Source: *State Superintendent's Vision for 21st Century Assessment – published March 26, 2007*

Formative Assessment- What classroom teachers should be using on a weekly basis to keep up with a child's progress in a subject.

A process used by teachers and students during instruction that provides feedback to adjust ongoing teaching and learning to help students improve their achievement of intended instructional outcomes.

Formative assessment is found at the classroom level and happens minute-to-minute or in short cycles. **Formative assessment is not graded or used in accountability systems. The feedback involved in formative assessment is descriptive in nature so that students know what they need to know next to improve learning.**

Interim/Benchmark Assessment.

Interim/benchmark assessments are given to students periodically throughout the year or course to determine how much learning has taken place up to a particular point in time (summative). These assessments provide information for programs and instructional support. The main users of this information are teacher teams, curriculum coordinators, and principals.

Summative Assessment – End of Grade Tests/ End of Course Tests for ABC system

A measure of student learning to provide evidence of student competence or program effectiveness. Summative assessments are found at the classroom, district and state level and can be graded and used in accountability systems. The information gathered from summative assessments is evaluative and is used to categorize students so performance among students can be compared.

Classroom assessments should promote learning (formative) and help determine how much learning has taken place at a particular point in time (summative). Both ways of assessing are essential to student learning and the information gathered is used to inform students, teachers and parents.

A teacher who is competent and knows how to differentiate instruction among the students in the classroom will utilize formative assessments to determine if a child is mastering the critical standard being taught at that point in the course which is supposed to align with the pacing guide for the course.

The formative assessment is not a “test” but merely a measurement of the student’s knowledge and understanding of the critical standard being taught in the class at that point in the course. The formative assessment is a necessary tool because if the student has not mastered the critical standard being taught at that time, the assessment informs the teacher of that fact and will enable the competent teacher to focus or change instruction on that critical standard for that student to enable the student to master the subject. A competent teacher will frequently use formative assessments so that no student will be left behind as the course progresses.

The benchmark assessment is a “test” which should be given at strategic points along the course path, such as a test at the end of a particular unit in the course or at a specific period of time such as half-way through a nine week grading period. Ideally, the district office or the school principal, in collaboration with teachers that are teaching the same course or subject in the school, should prepare the benchmark assessment aligning the questions with the critical standards that should have taught during the preceding time period. This is called a common benchmark assessment.

The benchmark test is given in each class in which the subject is being taught, graded and the results are evaluated to determine whether or not the students have achieved grade level mastery of the content in the course to date. The benchmark results also reveal what parts of the critical content that the students have not mastered during period and this data should drive the instruction for those students who have not mastered the critical content and who need remediation in that area in order achieve grade level mastery of the subject.

Another benefit of the competent use of common benchmark assessments is that within a single school or school district if district wide benchmarks are used, the teachers in a professional learning community (PLC), can benefit as a group by focusing on the failures of certain students to master the critical standards and work as team on the subject content to improve instruction in their classrooms and to design targeted instructional interventions to get students to master the critical standards in the course.

By engaging in proper classroom instruction, which includes following the pacing guide, using frequent formative assessments, and properly prepared common benchmark assessments and targeted interventions to assist students master the critical standards during the course of the school year or block period, there is no excuse for any student not to be

properly prepared to take the summative assessment (EOG or EOC) at the end of the course. This is not “teaching to the test” but rather proper, competent instruction that should be the standard in every single school and classroom. This is so because when students are properly instructed during the length of the course, they have mastered the curriculum to the extent that when they take the EOG or EOC summative assessments they will be prepared to show that they have mastered the course critical content as Level III or above.

The bottom line is that the SCOS contains critical standards that should be taught with the use of pacing guides utilizing formative assessments and benchmark assessments throughout the length of the course.

This is not “teaching to the test” but rather, properly and competently done by the teacher, the children learn the critical content standards in the course and are ready to take the summative, EOC or EOG tests at the end. The questions on the tests measure whether or not the child has mastered the critical standards, ie, the course materials, that are going to be on the summative test.

The problem comes when the teacher does not properly use formative assessments, benchmark assessments and the children in the class do not know the subject’s critical standards because they have not been properly and timely taught and/or remediated during the course of the school year.

“Teaching to the test” is just another excuse by an adult who has not properly instructed the children in the classroom over the length of the course. It is not a valid or justifiable reason for eliminating EOC and EOG tests.

Part Four:

Another important factor in being able to use EOC test data, in addition to providing objective academic results on student and school academic performance, is accountability to the public so that the public may know, not only the level of academic achievement, but also whether that academic achievement justifies the cost to taxpayers of maintaining public schools wherein the test data indicates that students are not obtaining a sound basic education. This applies to all schools - elementary, middle and high schools.

Removing accountability by eliminating the objective EOC test results for students in any subject also removes accountability for the cost to the taxpayer and the State of North Carolina for providing instruction in those courses because the level of academic achievement is no longer objectively measured by EOC tests.

It is inconceivable that any responsible business enterprise would spend billions of dollars a year in salaries without knowing whether its employees are doing their jobs in a proper manner. The business of education should be treated no differently **considering that the bulk of the expense to maintain any school, especially high schools, is salaries and benefits to the employees who are supposed to be Leandro compliant, to wit: competent, certified professionals.**

The opportunity to obtain a sound basic education belongs to the children, **not to the adults. The public schools do not exist for the adults to have jobs, they exist for the children to obtain a sound basic education. If you are going to teach you should be accountable for the results in your classroom.**

On March 3, 2006, I sent a letter to Chairman Lee and to Superintendent Atkinson about this very problem in poor performing high schools. **The basis for establishing poor academic performance was the EOC tests.** A portion of that letter follows:

THE BOTTOM LINE IS: The constitutional right of every child to have the equal opportunity to obtain a sound basic education **belongs to the child** and **not** to the superintendent, principal, teacher, school board member or other administrators in the LEA.

The consistently low performing, priority high school is not providing the children, who are required to attend that school regardless of where the children live, with the constitutionally mandated competent certified, effective principals, competent, certified effective teachers and the resources needed to carry out an effective educational program.

The children who have to attend such schools are being deprived of a basic constitutional right under the North Carolina constitution when they are not provided the assets that are mandated. That right may not be trumped by those whose duty and responsibility is to provide an equal opportunity to the children and who are not doing so.

The proof is in the ABC scores for the school. A non **Leandro-compliant** principal or teacher may not stand between a child and the equal opportunity to obtain a sound basic education in any school, but it is critical in high school.

The children that are attending these low performing priority high schools, regardless of location, should not have to continue to be uneducated and unable to compete effectively with others in today's complex and changing society and economy. There is no longer time to wait for change to come when the educators in charge aren't effective.

There has to be a consequence for continually failing to move a high school upwards in student performance and for failing, after due notice, to seek and embrace change in the high school structure or even make the effort to put in place a ninth grade academy.

Due notice about poor high school performance was given in earnest in 2004 and throughout 2005. Simply put, this dismal high school academic performance cannot continue. There must be a serious consequence for continued poor performance in high schools.

Reduced to essentials, superintendents and principals have run out of room and run out of time. The State is clearly and ultimately legally responsible for these high schools and

all other schools. The constitutional threshold has been spelled out and in existence since April 2002.

An ineffective principal cannot stay on any longer and continue to preside over a high school where no more than 55% of the students tested on EOG tests perform at or above grade level.

While I personally believe that the figure should be 65% at a minimum, I have looked to the General Assembly for the definition of a "low performing" school composite score that was enacted during the liability stage of this case to trigger the consequence for continued failure of a high school to achieve decent student performance.

I have found the performance trigger in S.L. 2001-424.

The General Assembly established a budgetary fund in excess of \$10,000,000 for the 2001-02 fiscal year, increasing for the 2002-03 fiscal year for low performing elementary schools so that they could receive the "tools needed to dramatically improve student achievement." S.L. 2001-424.

The lowest-performing elementary schools performance composite trigger was "**no more than fifty-five percent (55%) of the students performed at or above grade level**" and the school was 80% FRL. The critical factor to the Court is the performance level selected by the General Assembly in its wisdom – a level of **55% performance composite**. S.L. 2001-424. Section 29.1

This letter is to put you on notice that in the event the 2005-2006 ABC performance composite for **any** of the **44 priority high schools** is at 55%, or below, and that particular high school's performance composite scores for the previous four (4) years are also at 55%, or below, then and in such an event that high school **will not be allowed to open** in the fall of 2006 unless there is (a) new management in place approved by the State Board of Education, and (b) a valid plan underway, approved by the State Board of Education, to redesign the high school with an instructional design for a 21st Century High School and a staff committed to implementing that change.

It's time that our children who are under the thumb of non **Leandro-compliant** principals, teachers and superintendents get out from under.

Following that event, there was much whining and sulking by the educators in the identified high schools. However, the State of North Carolina stepped to the plate and established a school transformation project to deal with those 44 high schools and others that had performance composites below 60%.

Over the past five (5) years, I have had placed into evidence in the **Leandro** case each year **the financial costs of maintaining these 44 high schools to the taxpayers of North Carolina**. While some of these high schools have made great progress thanks to great principals and teachers, others continue to wallow in mediocrity or worse and their students continue to fail to obtain a sound basic education as evidenced by – you guessed it – the EOC test data on all 9 subjects tested.

The expenditures to maintain these 44 high schools last year, 2010, was **\$265,185,747** of which, **on average, 92.4% were salaries and benefits for the adults charged with the responsibility for educating the children attending those high schools.**

In fact, over the past six (6) years, beginning with 2005, the combined cost to the taxpayers of North Carolina to maintain and staff these 44 high schools has been in over one billion dollars - **\$1,152, 505, 878.00 – the bulk of which has been to pay the adults' salaries' and benefits.**

Eliminating the EOC tests effectively blocks scrutiny of the academic performance of those high school children in 4 (44%) courses that are required to be mastered by **Leandro** in order that those children can compete with others in further formal education and vocational training in a complex society. **The adults teaching those subjects are provided a free pass from accountability and from the public scrutiny of the academic progress or lack thereof, revealed by the EOC tests and the true picture of how each high school is doing academically is blocked from public view. They are now going to be able to “teach” without having to worry about the public knowing whether they are Leandro compliant teachers or teachers who are not providing their students with the opportunity to obtain a sound basic education.**

Likewise, they would be “safe” from any form of pay for performance and the public would not know what it would be paying them for the results of their classroom performance in terms of student achievement. **Not good business practice at all. GE, IBM, Microsoft, and other businesses would not be engaging in that practice. Why should the public schools not be held accountable financially as well?**

The bottom line is that elimination of the EOC tests in these courses hides the evidence and proof of academic ineptitude and prevents the Court, the SBE, the public and the General Assembly itself from knowing whether or not the children taking US History, Physical Science, Algebra II, and Civics and Economics are obtaining a sound basic education in those subjects **while at the same time spending millions of dollars of the public's money without accountability for academic performance because there is no EOC data to show whether or child is performing at Level III or any Level at all.**

For the reason(s) set forth in this Memorandum, House Bill 48 and any similar legislation eliminating EOG and EOC testing is impermissible and would constitute a violation of the children's rights to have the equal opportunity to obtain a sound basic education as provided under the North Carolina Constitution and *Leandro I and II*.

Cc: The Honorable Bev Perdue, Governor
c/o Eddie Speas, General Counsel
The Honorable Burley B. Mitchell, Jr.
The Honorable Robert F. Orr
William C. Harrison, Chairman of the State Board of Education
June Atkinson, Superintendent of Public Instruction